IN RE LOW SEE KIM

HIGH COURT MALAYA, KUANTAN
LAMIN MOHD. YUNUS J
[ORIGINATING MOTION NO. 32-17-87]
12 FEBRUARY 1988

ADMINISTRATIVE LAW: *Judicial review - Application for leave to apply for certiorari and mandamus - Refusal of board to grant retail licences and public house licence - Statutory right of appeal not invoked - Whether alternative remedies must be exhausted - Religious council objected to earlier applications for licence - Whether board influenced - Mala fides.*

This was an application for leave to apply for orders of *certiorari* and *mandamus* to quash the decision of the Lembaga Pelesenan dan Eksais dated 26 November 1987 whereby the applicant's application for a retail licence and public house licence was rejected. The applicant did not appeal to the Minister within the prescribed period as provided by s. 35(7), Excise Act 1976. The applicant contended that the decision of the board was *mala fide* as they were influenced by an objection from the Muslim religious council in respect of earlier applications by the applicant for a licence. Those applications had been approved.

Held:

[1] The general principle was that domestic remedies must be exhausted before the applicant applies for judicial review. The applicant should have appealed to the Minister as provided by s. 35(7) Excise Act 1976 before making the present application.

[2] The applicant had not proved that the board acted *mala fide* since the earlier applications for licences were approved, it could not be inferred that the board had been influenced by the objection from the Muslim religious council.

[Application dismissed with costs.]

Case referred to:
Government of Malaysia & Anor. v. Jagdis Singh [1987] 2 MLJ 188

Legislation referred to:
Excise Act 1976, s. 35(7)
Income Tax Act 1967, s. 91(1)

For the applicant - S. Sivasubramanian (Wong Fook Leong with him); M/s. Siva, Ram & Associates
For the respondent - Vong Soh Fah, FC

JUDGMENT

Lamin Mohd. Yunus J:

In this case the applicant submitted his application for the retail licence and public house licence on 28 October 1987 for the period 1 January 1988 to 30 June 1988 to the Pengerusi Lembaga Pelesenan dan Eksais for the District of Pekan, Pahang. On 23 November 1987 he wrote to the Pengerusi Lembaga Pelesenan dan Eksais appealing to them to issue the licences applied for giving his reasons in support, On 28 November 1987 he received a letter from the District Officer, Pekan informing him that his application had been rejected

at a meeting of the Lembaga Pelesenan dan Eksais sitting on 26 November 1987. The said letter also indicated that if he was not satisfied with the decision of the Lembaga he may appeal to the Minister as provided under s. 35(7) of the Excise Act 1976.

Sub-section 7 of s. 35 reads:

> Any person aggrieved by the decision of the Licensing Board may within 30 days of being notified of the decision appeal there from to the Minister whose decision shall be final.

In the case of *Government of Malaysia & Anor. v. Jagdis Singh* [1987] 2 MLJ 188 Tan Sri Hashim Yeop Sani SCJ delivering the judgment of the Supreme Court dealt with the question as to whether domestic remedies must first be exhausted if such remedies were available. The learned Judge examined a series of authorities and at p. 189 he said:

> A clear principle is reiterated here i.e. it is not a rigid rule that whenever there is appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the Court but where there is another avenue of remedy open to the applicant it will only be exercised in very exceptional circumstances.
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> *In Re Preston* was a tax case. It was quite clear from the speeches of their Lordships in the House of Lords that the Inland Revenue Commissioners were not immune from the process of judicial review . But what was also made clear is that remedy by way of judicial review is not to be available where an alternative remedy exists except in very exceptional cases.

From the authorities cited the position seems to be quite clear in that the remedy by way of judicial review is still a matter of discretion for the High Court, but it will be available in only exceptional circumstances. In the *Jagdis Singh* case the respondent had received notices of additional assessment for Income Tax for the years 1979 to 1984 inclusive. The respondent wrote to the Department of Inland Revenue, Ipoh informing them of the respondent's desire to appeal against the additional assessments. However the respondent filed a notice of motion for an order of *certiorari* to quash the said notices of additional assessment. The grounds relied on by the respondent were that the notices of assessment were based on conjecture and have been issued maliciously and as a vindictive act. The High Court decided in his favour by granting the application. The Supreme Court reversed the decision on appeal and on the facts the Supreme Court found that the Inland Revenue Department was unable to make a proper assessment of the respondent's tax because of the failure of the respondent to comply with the various notices issued to him, the department was entitled to compute the tax under s. 91(1) of the Income Tax Act according to the best of the Director General's judgment. The Court said that the onus of proving to the Special Commissioners on appeal that the additional assessment were excessive or erroneous lay on the respondent. The true amount should be determined on appeal. The Supreme Court reversed the decision of the High Court in that *certiorari* was not to issue. This meant that in the circumstances of the case, domestic remedies must first be exhausted.

In the present case before me in view of s. 35(7) the question to my mind is whether this is a fit and proper case for me to exercise my discretion according to the principle as reiterated by the Supreme Court in the *Jagdis Singh's* case. In this case on 28 October 1987 the applicant submitted his application for the retail licence and public house licence

for the period 1 January 1988 till 30 June 1988 i.e. the first half of 1988. On 23 November 1987 the applicant wrote to the Pengerusi Lembaga Pelesenan Eksais for the District or Pekan see Exhibit 'J' to the affidavit of applicant as per encl. (3) appealing for his application to be approved. Three days later i.e. on 26 November 1987 the Lembaga sat and rejected the application and on 28 November 1987 the applicant came to know of the decision by a letter from the Lembaga which also informed him that if he was not satisfied with the decision, he could appeal as provided for under s. 35(7) of the Excise Act. By virtue of sub-section (7), he had 30 days i.e. from the day he was notified of the decision, within which to lodge his appeal to the Minister. The applicant applied for those two licences to commence on 1 January 1988 and from the day he came to know of the decision to the proposed date of commencement of those licences he had more than 30 days. The applicant did nothing and only after 24 days had passed i.e. on 22 December 1987 he came to this Court instead to file notice of originating motion to ask this Court for leave to apply for an order of *Certiorari* and *Mandamus*. No explanation was offered why applicant did not take any action earlier either to appeal to the Minister or come to this Court. If he had appealed to the Minister upon intimation of the rejection letter the fate of his appeal could possibly have been known before the end of December 1987. However, his inaction for 24 days in the absence of any explanation does seem to suggest that the very nature of his case did not demand his urgent attention.

To grant or not to grant the licences was a matter well within the jurisdiction of the Lembaga to decide (s. 35(1) of the Excise Act). The applicant by his letter of 23 November 1987 forwarded his grounds in support of his application (though there is no such requirement under the law) and hoped that they would be considered favourably. The Lembaga sat in Pekan the same town where the applicant resided and it can safely be assumed that the Lembaga must have sight of the letter when it sat to consider his applications. I say so because the rejection letter from the Lembaga was received by the applicant within two days whilst his letter of 23 November had an extra clear day for it to reach the Lembaga. In view of the time available, it can be assumed that his plea had been considered. In the circumstances the proper thing for him to do was to immediately appeal to the Minister. As I am of the view that in this case the applicant must first exhaust the remedies under the Statute, I do not think I need deal with other issues except perhaps the allegation of *mala fides*.

The applicant alleged that the decision of the Lembaga was *mala fides* on the ground that the Lembaga was influenced by the objection of the Majlis Ugama Islam dan Adat Resam Melayu Pahang in the earlier applications for licence in respect of the second half of 1987. Those applications were finally approved after the filing of Originating Motion No: 32-14-87 i.e. after 23 October 1987 notwithstanding the objection from the Majlis. (I am quite aware of the approval in writing by a letter dated 10 July 1987 but received on 23 October 1987). In the circumstances I find it difficult to accept the inference that the Lembaga had been influenced by the Majlis' earlier objection in deciding the present application. In the earlier applications, since they were approved, the objection from the Majlis then must be assumed to have counted for naught. How can it now be said that same objection must have anything to do with the present application. Therefore I am of the view that the applicant has not proved *mala fides* on the part of the Lembaga when rejecting the present applications for those licences in respect of the first half of 1988.

In conclusion I hold that the facts relating to the present applications do not constitute such an exceptional circumstance in order that I may properly exercise my discretion to grant the remedy prayed for.

Application is dismissed with costs.

Also found at [1988] 2 CLJ 66